

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 149 OF 2007

MIRIAM KHILJIPLAINTIFF

VERSUS

EZEKIEL KARANJA NDUNEDEFENDANT

RULING

This is a very old case which was flagged for dismissal on 16th June, 2016 under Order 17 Rule 2(1) of the Civil Procedure Rules. The record shows that on the said date, both parties did not appear and the dismissal order was accordingly made. There is now before me an application by way of Notice of Motion under Order 17 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act for an order that, the order made on 16th June, 2016 dismissing this suit for want of prosecution be set aside and the suit be reinstated for hearing on its merit.

The reasons for seeking that order are set out on the face of the application alongside a supporting affidavit sworn by the advocate for the plaintiff. The application is opposed and there is a replying affidavit sworn by the advocate for the defendant.

I have considered the application which counsel agreed should be decided on affidavit evidence filed by both parties. The last time this matter was listed for hearing was 24th April, 2013 but nothing took place on the said date. The advocate for the plaintiff has stated that the court diary was closed anytime they wanted to list the matter for hearing. He has annexed copies of letters addressed to the advocate for the defendant inviting them to list the case for hearing.

The court record also bears witness to such attempts and I have no reason to doubt the same. What then this shows is that the plaintiff has been a victim of systemic challenges that afflict most litigants who come before the court. There is yet another reason advanced by the plaintiff's advocate for failing to show cause why the suit should not be dismissed. The notice under Order 17 Rule 2 was not served. There is no evidence on the record to contradict that averment. Indeed, if the said notice had been served upon both counsel the defendant's counsel would have appeared on the date the suit was dismissed. The fact that both advocates did not appear on the date the suit was dismissed, lends credence to the fact that the notice was not served.

Although this is an old case, I am inclined to give the plaintiff the last chance to prosecute her suit. Accordingly, the order made on 16th June, 2016 is hereby set aside and the suit reinstated for hearing. Going by the pleadings herein, the dominant issue is breach of a lease or tenancy agreement. It is clear therefore that this is a matter that should be heard and determined by the Environment and Land Court.

Accordingly, this file shall be, and is hereby transferred to the ELC for hearing and determination with the request that priority be accorded in view of its age. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 7th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE